Supreme Court, U.S.
FILED
OCT 31 2008
OFFICE OF THE CLERK

No. 08-138

In the Supreme Court of the United States

MOLA DEVELOPMENT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
JEANNE E. DAVIDSON
KENNETH M. DINTZER
BRIAN A. MIZOGUCHI
VINCENT D. PHILLIPS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Petitioner owned a controlling interest in a savings and loan that was allowed to merge with another institution in 1988. The regulatory approval of the merger contained no provision or forbearance regarding treatment of goodwill. The question presented is as follows:

Whether the government's approval of the proposed merger resulted in the formation of a contract between the United States and petitioner regarding the future regulatory treatment of goodwill with respect to the merged entity.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Admiral Fin. Corp. v. *United States*, 378 F.3d 1336 (Fed. Cir. 2004) 11

Anderson v. *United States*, 344 F.3d 1343 (Fed. Cir. 2003) 5, 10, 11

California Fed. Bank, FSB v. *United States*, 245 F.3d 1342 (Fed. Cir. 2001), cert. denied, 534 U.S. 1113 (2002) 14

Castle v. *United States*, 301 F.3d 1328 (Fed. Cir. 2002), cert. denied, 539 U.S. 925 (2003) 15

Crowley v. *United States*, 398 F.3d 1329 (Fed. Cir.), cert. denied, 546 U.S. 1031 (2005) 10

D&N Bank v. *United States*, 331 F.3d 1374 (Fed. Cir. 2003) 5, 6, 7, 15

Fifth Third Bank v. *United States*, 402 F.3d 1221 (Fed. Cir. 2005) 5, 7, 10

Franklin Fed. Sav. Bank v. *United States*, 431 F.3d 1360 (Fed. Cir. 2005) 5

Glendale Fed. Bank, FSB v. *United States*, 378 F.3d 1308 (Fed. Cir. 2004), cert. denied, 544 U.S. 904 (2005) 14

Cases—Continued: Page

Hatzlachh Supply Co. v. *United States*, 444 U.S. 460 (1980) 9
Hometown Fin. Inc. v. *United States*, 409 F.3d 1360 (Fed. Cir. 2005) 11, 14
Hughes v. *United States*, 498 F.3d 1334 (Fed. Cir. 2007), cert. denied, 128 S. Ct. 1869 (2008) 14
Long Island Sav. Bank, FSB v. *United States*, 503 F.3d 1234 (Fed. Cir. 2007), cert. denied, No. 07-1234 (Oct. 6, 2008) 14
Suess v. *United States*, 535 F.3d 1348 (Fed. Cir. 2008) .. 11
United States v. *Algoma Lumber Co.*, 305 U.S. 415 (1939)9 9
United States v. *Winstar Corp.*, 518 U.S. 839 (1996) 2, 8, 9, 15
Winstar v. *United States*, 64 F. 3d 1531 (Fed. Cir.), aff'd, 518 U.S. 839 (1996) 5
Wisniewski v. *United States*, 353 U.S. 901 (1957) 10

Statutes:

Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ..... 1, 3
12 U.S.C. 1462a 4
12 U.S.C. 1463 4
28 U.S.C. 1295(a)(3) 10

In the Supreme Court of the United States

No. 08-138

MOLA DEVELOPMENT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 516 F.3d 1370. The opinion of the Court of Federal Claims (Pet. App. 34a-85a) is reported at 74 Fed. Cl. 528.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2008. A petition for rehearing was denied on May 5, 2008 (Pet. App. 86a-88a). The petition for a writ of certiorari was filed on August 1, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is one of the breach-of-contract cases that were filed after the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989

(FIRREA), Pub. L. No. 101-73, 103 Stat. 183. See *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996) (*Winstar*). Of the approximately 122 *Winstar*-related cases that were originally filed, approximately 15 remain pending. Most of those cases, like this one, have nearly completed the litigation process.

1. In 1984, petitioner entered the financial services business by acquiring a financially troubled California savings and loan, which it renamed Charter Savings Bank (Charter). After that acquisition, petitioner hired consultants to find another troubled financial institution for it to acquire and merge into Charter. Pet. App. 2a-3a, 38a-39a.

In November 1987, petitioner's consultants selected Merit Savings Bank (Merit) as a merger target. On December 15, 1987, the Federal Home Loan Bank Board (FHLBB) proposed that Merit be placed on a bidding schedule for sale in June 1988. In late December 1987, petitioner and Charter informed Merit of their interest in merging Merit into Charter. Petitioner notified the government about the proposed transaction the next day. On January 15, 1988, petitioner and Merit entered into a formal agreement regarding the terms of a merger between Charter and Merit. The government was not a party to that agreement. Pet. App. 3a-4a, 38a-39a.

On January 28, 1988—13 days after reaching a merger agreement with Merit—petitioner approached the FHLBB to discuss the terms for regulatory approval of the proposed merger. During those discussions, petitioner asked the government to allow it to make a non-cash contribution in order to bring the merged entity into compliance with capital requirements. FHLBB officials denied that request and stated their opposition to

permitting petitioner to fund the merged entity through a non-cash contribution. Pet. App. 4a, 39a-40a.

On April 19, 1988, petitioner and Charter filed a formal application for regulatory approval of the proposed merger. The application described the planned use of the purchase method of accounting and the amortization of any resulting goodwill over a period not to exceed 25 years. Those provisions were consistent with Generally Accepted Accounting Principles and standard FHLBB policy at the time, and thus required no regulatory forbearance. The merger application also requested six specific regulatory forbearances, none of which concerned the regulatory treatment of goodwill. Pet. App. 4a.

Discussions between petitioner and the government continued following the filing of the April 19, 1988, merger application. On May 20, 1998, FHLBB officials informed petitioner that they would not grant any of the requested forbearances and that the merger would be approved only if petitioner made a cash contribution that was sufficient to meet the regulatory minimum capital levels. On May 24, 1988, petitioner asked the FHLBB to designate the merger as "supervisory" in order to facilitate "use of net operating losses for tax purposes." Pet. App. 5a (citation omitted).

On June 24, 1988, the FHLBB granted preliminary approval to the Charter/Merit merger. As petitioner had requested, the government classified the merger as "supervisory." The approval letter said nothing about the regulatory treatment of goodwill. The only regulatory forbearance mentioned in the approval letter stated that "the calculation for the cash contribution shall exclude scheduled items of Merit as of September 30, 1987." Pet. App. 6a (citation omitted). That forbearance

allowed petitioner to exclude certain of Merit's problem loans in calculating the required cash contribution. *Id.* at 5a-6a.

The merger between Charter and Merit closed on July 29, 1988. The FHLBB did not adopt a formal resolution approving the merger. Pet. App. 5a.

2. In August 1989, Congress enacted FIRREA to address widespread problems in the savings and loan industry. FIRREA created the Office of Thrift Supervision (OTS) and charged it with examining, supervising, and regulating federally insured thrifts. 12 U.S.C. 1462a, 1463. On December 7, 1989, regulations implementing FIRREA became effective. Pet. App. 6a. Charter was not in compliance with the new regulations. *Ibid.* OTS seized the thrift on June 15, 1990, and regulators ultimately liquidated Charter. *Ibid.*

3. Petitioner filed suit in the Court of Federal Claims, alleging that FIRREA's enactment breached a contract between petitioner and the government regarding the regulatory treatment of goodwill. Pet. App. 7a. The court granted summary judgment in favor of the government. *Id.* at 34a-85a. The court determined that "[t]here [was] nothing in [petitioner's] application or the history of negotiations asking for extended amortization of goodwill or the continued ability to count goodwill as capital in the face of regulatory change," and it stated that "[t]he alleged negotiations and documents cited by [petitioner] show nothing more than regulatory approval of an acquisition." *Id.* at 82a-83a. As a result, the court held that petitioner "ha[d] failed to show the 'something more' [that is] necessary to remove the transaction from the realm of regulatory approval." *Id.* at 83a.

4. The court of appeals affirmed. Pet. App. 1a-20a.

a. The court of appeals stated that, "[i]n order to prevail in a *Winstar* case[,] a plaintiff . . . must establish that a contract existed with the government whereby the government was 'contractually bound to recognize the supervisory goodwill and [particular] amortization periods.'" Pet. App. 13a-14a (quoting *Franklin Fed. Sav. Bank* v. *United States*, 431 F.3d 1360, 1365 (Fed. Cir. 2005), and *Winstar* v. *United States*, 64 F.3d 1531, 1541 (Fed. Cir.), aff'd, 518 U.S. 839 (1996)). The court further observed that, in order to demonstrate the existence of a *Winstar* contract, the plaintiff must establish four elements, including "mutuality of intent to contract." *Id.* at 14a (quoting *Anderson* v. *United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003)).

The court of appeals reiterated its previous statements that "a formal written agreement is not necessary to prove the existence of a *Winstar* contract where there is other adequate evidence of the government's intent to form a contract." Pet. App. 15a (citing *Fifth Third Bank* v. *United States*, 402 F.3d 1221, 1231-1232 (Fed. Cir. 2005)). The court emphasized, however, that "[a]n agency's performance of its regulatory or sovereign functions does not create contractual obligations," *id.* at 14a (quoting *D&N Bank* v. *United States*, 331 F.3d 1374, 1378-1379 (Fed. Cir. 2003)), and that "[m]ere approval of the merger does not amount to [an] intent to contract." *Ibid.* (quoting *Anderson*, 344 F.3d at 1353, and *D&N Bank*, 331 F.3d at 1378). The court of appeals explained that, in order for a plaintiff to demonstrate the existence of a *Winstar* contract, "there must . . . be a clear indication of intent to contract" and the plaintiff must raise "more than a cloud of evidence that could be consistent with a contract." *Ibid.* (quoting *D&N Bank*, 331 F.3d at 1377-1378).

In this case, the court of appeals determined that there was "no evidence of any negotiation about the regulatory treatment of goodwill that could serve as evidence that the government agreed to a goodwill contract." Pet. App. 15a; see *id.* at 6a (observing that "[n]o document purports to be a written agreement between the FHLBB and either [petitioner] or Charter"). The court rejected petitioner's contention "that its negotiations for the FHLBB's designation of the merger as 'supervisory' is sufficient evidence of the government's intent to form a contract with respect to regulatory treatment of goodwill." *Id.* at 15a. The court explained that it had "rejected a similar argument in *D&N Bank*," and had stated that "labeling a merger 'supervisory' alone, . . . tell[s] us nothing about the government's intent to contract." *Id.* at 15a-16a (quoting *D&N Bank*, 331 F.3d at 1380) (brackets in original).

The court of appeals also rejected petitioner's contention "that the negotiation over the supervisory designation" in this particular case "was in effect a negotiation over the treatment of goodwill." Pet. App. 16a. The basis of that argument was petitioner's claim that a "supervisory" "designation was necessary, under the prevailing regulations, to allow use of the purchase method of accounting," which was, in turn, "the only accounting method that would recognize goodwill as an asset for regulatory purposes." *Ibid.* The court of appeals "disagree[d] with [petitioner's] construction of the regulations," *ibid.*, concluding that neither the regulations themselves nor an internal FHLBB memorandum supported petitioner's "assertion that the supervisory designation was necessary to utilize the purchase method of accounting." *Id.* at 18a.

Finally, the court of appeals rejected petitioner's argument "that the government must have intended to form a contract with respect to regulatory treatment of goodwill because Charter would not have had sufficient capital to meet regulatory requirements absent the inclusion of goodwill in its regulatory capital calculation." Pet. App. 19a. The court acknowledged that "imminent regulatory noncompliance may help to establish that negotiated forbearances were contractual." *Ibid.* (citing *Fifth Third Bank*, 402 F.3d at 1232). The court of appeals stated, however, that "the mere risk of regulatory noncompliance absent use of the purchase method of accounting does nothing to establish the existence of a goodwill contract." *Ibid.* (citing *D&N Bank*, 331 F.3d at 1380). The court concluded that, "[i]n the absence of other evidence indicating the government's intent to contract," the FHLBB's approval of "a merger that, without the inclusion of goodwill in Charter's regulatory capital calculation, would have left Charter's capital level below the regulatory minimum does not establish any contract to maintain this treatment of goodwill." *Ibid.* The court of appeals therefore declined to "reach the government's contention that [petitioner] lacks standing to assert a *Winstar* breach of contract claim because [petitioner] was not a party to any agreement with the government regarding regulatory treatment of goodwill, even if Charter was a party to such a contract." *Id.* at 19a n.9.

b. Judge Newman dissented in relevant part. Pet. App. 21a-33a. In her view, "[t]he circumstances and documents [in this case] left no doubt that a contract including supervisory goodwill was intended and formed." *Id.* at 22a.

ARGUMENT

The court of appeals correctly held that no contract was formed between petitioner and the government regarding the future regulatory treatment of goodwill with respect to the merged Charter/Merit entity. The court of appeals' decision in this case is consistent with this Court's decision in *Winstar* and does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore unwarranted.

1. No conflict exists between the court of appeals' ruling here and this Court's decision in *Winstar*. As petitioner acknowledges (Pet. 9), "[t]he issue of contract formation was not squarely before this Court in *Winstar*." Accord *Winstar*, 518 U.S. at 860 (opinion of Souter, J.) (stating that "[t]he anterior question whether there were contracts at all between the Government and respondents dealing with regulatory treatment of supervisory goodwill and capital credit * * * is not strictly before us"). And although the issues before the Court in *Winstar* "require[d] some consideration of the nature of the underlying transactions," *id.* at 861, petitioner identifies no language supporting its assertion (Pet. 5) that *Winstar* announced a single "standard" for determining whether a contract was formed in the first instance. There is likewise no basis for petitioner's assertion (*ibid.*) that, under *Winstar*, "regulatory documents papering the transactions [are] to be construed as part of a contractual commitment and not as mere statements of regulatory policy."

In each of the transactions before the Court in *Winstar*, the Federal Savings and Loan Insurance Corporation (FSLIC) and a thrift institution had formally signed a document entitled "Assistance Agreement" or "Supervisory Action Agreement." See 518 U.S. at 861-868

(opinion of Souter, J.). Those documents on their face constituted "agreements" between the government and private parties, and they included standard contractual clauses, such as integration clauses. See *ibid.* The issue before the Court in *Winstar* was not whether contracts had been formed between FSLIC and the thrifts, but whether those contracts contained terms regarding the treatment of supervisory goodwill that subjected the United States to liability when Congress passed a law affecting that treatment. The decision in *Winstar* does not support the proposition, essential to petitioner's claim here, that the mere act of regulatory approval can be regarded as an implicit contractual promise by the government that the existing legal framework will not change. To find a contract on the basis of actions by a federal agency in executing a regulatory law would not only violate ordinary principles of contract formation and administrative law, but would also violate the prohibition under the Tucker Act against recognizing contracts implied in law. See *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5 (1980) (per curiam); *United States* v. *Algoma Lumber Co.*, 305 U.S. 415, 421 (1939).

Petitioner is correct that, during the 12 years since *Winstar* was decided, the Federal Circuit has fleshed out the standards for determining whether a *Winstar* contract was formed in a particular case. Petitioner is also correct (Pet. 9) that some of the precise details of the doctrine that the Federal Circuit has developed in this area are not, in a strong sense, "mandate[d]" by this Court's decision in *Winstar*. But that does not mean that those decisions conflict with *Winstar*. It simply means that the Federal Circuit has been required, like any other lower court, to apply the general principles

stated in this Court's decisions to situations that the Court did not specifically address. Cf. Pet. 10 (urging that this Court should "step in and *define* the parameters of a *Winstar* contract for the treatment of supervisory goodwill" (emphasis added)).

2. Petitioner also suggests (Pet. 9) that this Court's review is warranted because the court of appeals' decision in this case conflicts with its own prior decisions. An intra-circuit conflict would not be a reason for this Court to grant a writ of certiorari. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).*

In any event, there is no conflict between prior Federal Circuit decisions and the court of appeals' decision in this case. The court of appeals quoted (see Pet. App. 14a) the same four requirements for the formation of a *Winstar* contract that it had set out in *Anderson* v. *United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003) (see Pet. 18). The court also acknowledged (Pet. App. 15a) that its decision in *Fifth Third Bank* v. *United States*, 402 F.3d 1221, 1234 (Fed. Cir. 2005) (see Pet. 11, 24-25, 30), had established that "a formal written agreement is not necessary to prove the existence of a *Winstar* contract when there is other adequate evidence of the government's intent to form a contract." The court of appeals simply found that, in this case, there was "*no* evidence of *any* negotiations about the regulatory treatment of goodwill that could serve as evidence that the

---

* Nor would any "conflict" between the court of appeals' decision in this case and the "Court of Federal Claims' own prior law" (Pet. 9) merit this Court's review. The Federal Circuit has exclusive appellate jurisdiction over the Court of Federal Claims, see 28 U.S.C. 1295(a)(3), and its decisions are binding on that court. See *Crowley* v. *United States*, 398 F.3d 1329, 1335 (Fed. Cir.), cert. denied, 546 U.S. 1031 (2005).

government agreed to a goodwill contract." Pet. App. 15a (emphases added). And petitioner does not even attempt to explain how the court of appeals' decision in this case conflicts with *Hometown Financial, Inc.* v. *United States*, 409 F.3d 1360 (Fed. Cir. 2005) (see Pet. 15-16), *Admiral Financial Corp.* v. *United States*, 678 F.3d 1336 (Fed. Cir. 2004) (see Pet. 16), or the "other" unspecified "precedent of the Federal Circuit" that petitioner invokes. Pet. 30.

3. Petitioner suggests that this Court should grant certiorari because the court of appeals reached the wrong result in this particular case. See *e.g.*, Pet. 10, 12-16, 18-23, 26-30. But the "determination of whether the government has shown assent to a contract guaranteeing a particular treatment of goodwill is a fact-intensive inquiry," *Suess* v. *United States*, 535 F.3d 1348, 1360 (Fed. Cir. 2008), and petitioner's request for case-specific error-correction does not warrant this Court's review.

In any event, the court of appeals correctly concluded that there was no contract regarding the regulatory treatment of goodwill in this case. The court did not require petitioner to demonstrate the existence of any "magic language" (Pet. 9, 19, 30), "key words" (Pet. 23), or a "single integrated contract document" (Pet. 23). Rather, the court of appeals ruled against petitioner because it concluded that there was "*no* evidence of *any* negotiations about the regulatory treatment of goodwill that could serve as evidence that the government agreed to a goodwill contract." Pet. App. 15a (emphases added).

The court of appeals likewise did not rely on any "magic language" test in rejecting petitioner's contention that its negotiations with the FHLBB about treating the merger as "supervisory" was, in effect, a negoti-

ation for a goodwill contract. Instead, the court rejected the underlying premise of petitioner's argument, *i.e.*, that a supervisory designation was "*necessary*, under the prevailing regulations, to allow use of * * * the only accounting method that would recognize goodwill as an asset for regulatory purposes." Pet. App. 16a (emphasis added). Petitioner does not contend that the court of appeals' conclusion on that point was erroneous. Nor does petitioner acknowledge the undisputed evidence—cited by both the Court of Federal Claims (see *id.* at 48a-50a) and the court of appeals (see *id.* at 5a)—that the FHLBB understood petitioner's request for a "supervisory" designation as being for the purpose of permitting the merged entity "to utilize the benefits of a tax free reorganization and the net operating loss carryforwards of Merit." *Id.* at 5a (citation omitted).

Contrary to petitioner's repeated suggestions (Pet. 9, 11), the court of appeals did not hold that there can never be a *Winstar* contract where the terms of a given merger agreement were "consistent with the FHLBB's regulatory policy at the time." Pet. 11. The court simply reaffirmed that "[m]ere approval of the merger does not amount to [an] intent to contract," and that a *Winstar* plaintiff must show "'something more' than mere regulatory approval" or performance of other sovereign or regulatory functions. Pet. App. 14a-15a (citation omitted); see p. 9, *supra*.

Petitioner further contends (Pet. 13) that it would have been "madness" for Charter to have acquired Merit in the absence of a contractual agreement with the government regarding the future treatment of goodwill. Petitioner argues (Pet. 13-14) that the purported irrationality of that course of conduct "is strong evidence that [both petitioner and the government] intended to be

bound by the accounting treatment of goodwill arising in the merger." Those arguments reflect a misconception of the regulatory framework that existed when the merger occurred. As the court of appeals explained (Pet. App. 18a), the regulations in effect at the time of the merger permitted Charter to count goodwill as regulatory capital without securing any forbearances or other approvals from the government. Accordingly, the merged institution would *not* "have been insolvent immediately upon the merger" (Pet. 13), regardless of the existence or lack of existence of a *Winstar* contract.

Nor is there anything inherently irrational about a private actor's entry into a commercial relationship whose prospects for success depend on the maintenance of an existing regulatory scheme. Even without a contractual commitment from the government that applicable statutes and regulations will not change, private parties frequently pursue that course, assuming the risk that the existing legal framework may change. As the court of appeals explained, "[i]n the absence of other evidence indicating the government's intent to contract," the fact that the success of petitioner's venture depended on the continued effectiveness of particular regulatory provisions does not establish that the government made a binding pledge to continue its existing regulatory approach. Pet. App. 19a.

Petitioner suggests (Pet. 15) that "other *Winstar* cases evidence" the government's objective intentions with respect to the merger at issue here. Petitioner's argument appears to be that, because the government included express risk-shifting language in certain agreements that courts later determined created binding contractual obligations on the government, the absence of any clear statement by the FHLBB here that petitioner

would be required to bear such risk of regulatory change is itself evidence of an intent to contract. But that puts the cart before the horse. In order to make its argument work, petitioner must *posit* (Pet. 16-17) that the FHLBB had a binding "agreement with [petitioner]," and thus assume away the central issue in this case.

4. Petitioner also contends (Pet. 8-10, 25, 31-32) that this Court's review is warranted because the Federal Circuit's decisions in *Winstar* cases have undermined this Court's *Winstar* decision and will discourage citizens from entering into commercial contracts with the government. That contention is incorrect.

As the Federal Circuit has correctly observed, *Winstar* claims frequently turn on their particular facts and circumstances, and each case must be considered on its individual merits. See, *e.g.*, *California Fed. Bank, FSB* v. *United States*, 245 F.3d 1342, 1347 (2001), cert. denied, 534 U.S. 1113 (2002). The Federal Circuit's decisions have not "increasingly chipped away at this Court's ruling in *Winstar* for the benefit of the government." Pet. 31. Some *Winstar* plaintiffs have been successful, while others have not. Cumulatively to date, plaintiffs in *Winstar*-related cases have been awarded more than $1 billion, and the awards in individual cases have ranged from $2.05 million to $381 million. See *Hometown Fin., Inc.*, 409 F.3d at 1362; *Glendale Fed. Bank, FSB* v. *United States*, 378 F.3d 1308, 1312 (Fed. Cir. 2004), cert. denied, 544 U.S. 904 (2005).

In other Federal Circuit decisions, relief has been denied based on findings of no contract (as in this case), lack of standing, forfeiture, fraud, or prior material breach. See *Long Island Sav. Bank, FSB* v. *United States*, 503 F.3d 1234, 1251, 1253 (Fed. Cir. 2007), cert. denied, No. 07-1234 (Oct. 6, 2008); *Hughes* v. *United*

States, 498 F.3d 1334, 1339 (Fed. Cir. 2007), cert. denied, 128 S. Ct. 1869 (2008); *Anderson*, 344 F.3d at 1359; *D&N Bank*, 331 F.3d at 1382; *Castle* v. *United States*, 301 F.3d 1328, 1337 (Fed. Cir. 2002), cert. denied, 539 U.S. 925 (2003). Cf. Pet. App. 19 n.9 (stating the court of appeals' conclusion that there was no *Winstar* contract in this case made it unnecessary to reach the government's contention that petitioner lacked standing because any alleged *Winstar* contract was between Charter and the government rather than between petitioner and the government). In the *Winstar*-related cases where it has rejected the plaintiffs' claims, the Federal Circuit has simply respected this Court's admonition that ordinary principles of contract construction and breach should be applied to government contracts. *Winstar*, 518 U.S. at 870-871, 895 (opinion of Souter, J.). Contrary to petitioners' apparent belief, this Court's decision in *Winstar* did not suggest that *all* persons who acquired savings and loans during the 1980s thereby became contractually entitled to receive compensation from the government for any subsequent business losses that could potentially be attributed to changes in the applicable regulatory framework.

In any event, the *Winstar* set of cases is nearing its end. Of the original 122 *Winstar*-related cases, only 15 remain. The issues raised by petitioner will thus have little, if any, future impact.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General
GREGORY G. KATSAS
Assistant Attorney General
JEANNE E. DAVIDSON
KENNETH M. DINTZER
BRIAN A. MIZOGUCHI
VINCENT D. PHILLIPS
Attorneys

OCTOBER 2008